

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

BRET LEE KERR,

Defendant-Appellant.

UNPUBLISHED

May 26, 2009

No. 285234

Kalkaska Circuit Court

LC No. 07-002820-FH

Before: Fitzgerald, P.J., and Talbot and Shapiro, JJ.

PER CURIAM.

Defendant appeals by delayed leave granted his conviction of operating a vehicle under the influence of intoxicating liquor (OUIL), third offense, MCL 257.625(9)(c). We affirm.

Defendant pleaded guilty to OUIL, third offense, resisting and obstructing a police officer, MCL 750.81d(1), and being an habitual offender, third offense, MCL 769.11, in return for dismissal of other charges.¹ Defendant acknowledged that he had been convicted of OUIL in 1996 and 2001. The trial court sentenced defendant as a third habitual offender to concurrent terms of 30 to 120 months for OUIL, third offense, and 16 to 24 months for resisting and obstructing a police officer.

We review issues of statutory construction and interpretations of constitutional provisions de novo. *People v Callon*, 256 Mich App 312, 315; 662 NW2d 501 (2003).

Under MCL 257.625(9)(c) as it read prior to January 3, 2007, a defendant who committed a drunken-driving related offense was guilty of felony drunk driving if he had been convicted of two or more drunken-driving related offenses within the previous ten years. 2006 PA 564, effective January 3, 2007,² amended MCL 257.625(9)(c) to remove the ten-year time frame. Now, the statute provides that a person who has been convicted of two or more drunken-

¹ The incident that lead to the charges occurred on February 13, 2007.

² This public act is also known as “Heidi’s Law.”

driving related offenses may be convicted of a felony upon committing a third offense, regardless of when the previous convictions occurred.

Defendant emphasizes that one of his prior convictions occurred more than ten years before the enactment of 2006 PA 564, and contends that as a result, his conviction of OUIL, third offense, violates the ex post facto clauses of the United States and Michigan Constitutions, US Const, art I, § 10, cl 1; Const 1963, art 1, § 10, because it increases the punishment imposed for acts that occurred in the past. In addition, defendant asserts that 2006 PA 564 was not intended to be applied retroactively.³ We disagree.

In *People v Sadows and People v Gale*, ___ Mich App ___, ___ NW2d ___ (Docket Nos. 286689, 286693, pub'd March 19, 2009 at 9:15 a.m.), this Court rejected the same ex post facto argument put forth by defendant. The *Sadows* Court relied on *People v Perkins*, 280 Mich App 244; 760 NW2d 669; aff'd 482 Mich 1118 (2008). The *Perkins* Court noted that an ex post facto law attaches legal consequences to acts that occurred before the law became effective, and thus prejudices a criminal defendant. *Perkins*, supra at 251. However, the *Perkins* Court reasoned that 2006 PA 564 does not attach legal consequences to acts that occurred prior to the date of its enactment, but rather permits enhancement of drunken-driving related offenses that occur after the date of its enactment. The *Perkins* Court held that 2006 PA 564 does not violate the constitutional provisions against ex post facto laws. *Id.* at 251-252. *Perkins* constitutes binding precedent that we must follow. MCR 7.215(C)(1).

“Whether a statute applies retroactively presents a question of statutory construction, which this Court reviews de novo.” *People v Conyer*, 281 Mich App 526, 528; 762 NW2d 198 (2008). The intent of the Legislature governs the determination. In general, a statute is presumed to operate prospectively unless the Legislature either expressly or impliedly indicated its intention to give the statute retroactive effect. An exception to this rule is recognized if the statute is remedial or procedural. A statute is remedial if it is designed to correct an existing oversight in the law or redress an existing grievance, or if it operates in furtherance of an existing remedy, and neither creates nor destroys existing rights. A statute that affects or creates substantive rights is not remedial, and is not given retroactive effect absent clear indication of legislative intent to do so. *Id.* at 529.

We conclude that defendant's argument that 2006 PA 564 was not intended to be applied retroactively is without merit. *Perkins* held that application of 2006 PA 564 in cases such as this permits enhancement of drunken-driving related offenses that occur after the date of its enactment. The *Perkins* Court's holding that 2006 PA 564 does not violate the constitutional provisions against ex post facto laws indicates that 2006 PA 564 does not destroy existing rights. Furthermore, the *Sadows* Court rejected the contention that applying the amended version of MCL 257.625(9)(c) would result in undue administrative burdens. *Sadows*, supra at slip op p 3 n 5. 2006 PA 564 appears to be remedial as that term is defined. *Conyers*, supra at 529.

³ Defendant does not challenge his conviction of resisting and obstructing a police officer.

Therefore, the trial court properly applied the amended version of MCL 257.625(9)(c) in this case.

Affirmed.

/s/ E. Thomas Fitzgerald

/s/ Michael J. Talbot

/s/ Douglas B. Shapiro